



BILLING CODE: 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

[RTID 0648-XC018]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training and Testing Activities in the Hawaii-Southern California Training and Testing Study Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Receipt of application for revision of regulations and Letters of Authorization; request for comments and information.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for revision of the existing regulations and Letters of Authorization (LOAs) authorizing the take of marine mammals incidental to Navy training and testing activities conducted in the Hawaii-Southern California Training and Testing (HSTT) Study Area. In 2021, two separate U.S. Navy vessels struck unidentified large whales on two separate occasions, one whale in June 2021 and one whale in July 2021. NMFS and the Navy discussed the vessel strikes, and the Navy has reanalyzed the potential for vessel strike in the HSTT Study Area. As a result, the Navy has requested two additional takes of large whales by serious injury or mortality by vessel strike for the remainder of the current regulatory period. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of the Navy's application for the development and implementation of revised regulations governing this additional incidental taking of marine mammals. NMFS invites the public to provide information, suggestions, and comments on the Navy's application and request.

DATES: Comments and information must be received no later than [*insert date 30 days after date of publication in the **FEDERAL REGISTER***].

ADDRESSES: Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to *ITP.Davis@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities> without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Leah Davis, Office of Protected Resources, NMFS, (301) 427-8401. An electronic copy of the Navy's application may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and

either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed incidental harassment authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), finds that the taking will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA defines “take” to mean to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

The National Defense Authorization Act (NDAA) for Fiscal Year 2004 (Pub. L. 108-136) amended section 101(a)(5) of the MMPA to remove the “small numbers” and “specified geographical region” provisions and amended the definition of “harassment” as applied to a “military readiness activity” to read as follows (Section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B Harassment). On August 13, 2018, the NDAA for Fiscal Year 2019 (Pub. L. 115-232) amended the MMPA to allow incidental take regulations for military readiness activities to be issued for up to seven years.

Summary of Request

On March 31, 2022, NMFS received an adequate and complete application (Navy's 2022 rulemaking/LOA application) from the Navy requesting that NMFS modify the existing regulations and LOAs to authorize two additional takes of large whales by serious injury or mortality by vessel strike over the remainder of the HSTT authorization period. The current HSTT regulations (50 CFR part 218, subpart H) and LOAs authorize the take of marine mammals from the Navy's training and testing activities in the HSTT Study Area through December 20, 2025. These regulations and LOAs authorize the take of three large whales by serious injury or mortality by vessel strike.

The Navy's 2022 request is based upon new information regarding U.S. Navy vessel strikes off the coast of southern California. As described in the Navy's 2022 rulemaking/LOA application, in 2021, two separate U.S. Navy vessels struck unidentified large whales off the coast of southern California on two separate occasions, one whale in June 2021 and one whale in July 2021. (Separately, a foreign naval vessel struck two fin whales off the coast of southern California in May 2021.)

The regulatory revision would be conducted through a proposed and final rulemaking analyzing the total proposed authorized take, including the requested additional takes of large whales by serious injury or mortality, consistent with the requirements of section 101(a)(5)(A) of the MMPA. The Navy's specified activities have not changed. Specifically, the activities include the same level and type of training and testing (all categorized as military readiness activities) including the same use of active acoustic sonar systems and other transducers, in-water detonations, air guns, construction activities involving pile removal and installation, and the operation of a fleet of vessels throughout the HSTT Study Area. These activities may result in the incidental take of marine mammals in the form of Level B harassment (behavioral disruption or temporary hearing impairment), Level A harassment (permanent hearing impairment or tissue damage), or serious injury or mortality in a very small number of cases.

Description of Activity

In the Navy's 2022 rulemaking/LOA application, the Navy proposes no changes to the specified activities covered by the 2020 HSTT final rule (85 FR 41780; July 10, 2020). The level of activity within and between years would be consistent with that previously analyzed in the 2020 HSTT final rule (85 FR 41780; July 10, 2020), and all activities would be conducted within the same boundaries of the HSTT Study Area identified in the 2020 HSTT final rule (85 FR 41780; July 10, 2020). Therefore, the training and testing activities (*e.g.*, equipment and sources used, exercises conducted) are identical to those described and analyzed in the 2020 HSTT final rule (85 FR 41780; July 10, 2020), including the level of vessel use.

Given the new information regarding U.S. Navy vessel strikes of large whales off the coast of southern California, the Navy's 2022 rulemaking/LOA application includes a revised analysis of vessel strike in the HSTT Study Area and a request for two additional takes by serious injury or mortality for large whales from vessel strikes, beyond that authorized in the 2020 HSTT final rule (85 FR 41780; July 10, 2020).

Regarding the quantification of expected takes from acoustic and explosive sources (by Level A harassment and Level B harassment, as well as mortality resulting from exposure to explosives), the number of takes are based directly on the level of activities (days, hours, counts, *etc.*, of different activities and events) in a given year, and the Navy has not changed these take numbers in its 2022 rulemaking/LOA application.

The Navy has changed its policy regarding Lookouts to require the use of three Lookouts on Navy cruisers and destroyers (the only types of Navy vessels that have struck whales in the Pacific) while underway, as compared to the previous requirement of one Lookout when a vessel was underway and not engaged in sonar training or testing. The Navy has included this update in its 2022 application. Otherwise, the mitigation, monitoring, and reporting measures included in the Navy's rulemaking/LOA application are identical to those described and analyzed in the 2020 HSTT final rule (85 FR 41780; July 10, 2020). Please see Section 11.1 (*Standard Operating Procedures*) and Section 11.2 (*Mitigation Measures*) of the Navy's 2022

rulemaking/LOA application, respectively, for additional detail. Mitigation would continue to include procedural mitigation measures and mitigation areas. Procedural mitigation would continue to include, but not be limited to, the use of trained Lookouts to monitor for marine mammals in mitigation zones, requirements for Lookouts to immediately provide notification of sightings to the appropriate watch station, requirements for implementation of powerdown and shutdown mitigation measures (based on activity defined zones), pre- and post-monitoring requirements for explosive events, and measures to reduce the likelihood of vessel strikes. Chapter 5 of the 2018 HSTT Final Environmental Impact Statement/Overseas Environmental Impact Statement (FEIS/OEIS) and the *Mitigation Measures* section of the 2018 HSTT final rule include detailed descriptions of mitigation measures for each specified activity in the HSTT Study Area. The Navy would also continue to implement mitigation measures within certain areas (Mitigation Areas) and/or at certain times to avoid or minimize potential impacts on marine mammals in areas and/or times where they are known to engage in biologically important behaviors (*i.e.*, for foraging, migration, reproduction), where the disruption of those behaviors would be more likely to result in population-level impacts. The *Mitigation Measures* section in the 2018 HSTT final rule includes detailed descriptions of geographic mitigation measures in the HSTT Study Area. Maps and tables of the mitigation areas can be found in Chapter 5 of the 2018 HSTT FEIS/OEIS.

The Navy would continue implementation of the robust Integrated Comprehensive Monitoring Program and Strategic Planning Process outlined in the current regulations at 50 CFR part 218, subpart H. The Navy's monitoring strategy, currently required by the existing regulations, is well-designed to work across Navy ranges to help better understand the impacts of the Navy's activities on marine mammals and their habitat by focusing on learning more about marine mammal occurrence in different areas and exposure to Navy stressors, marine mammal responses to different sound sources, and the consequences of those exposures and responses on

marine mammal populations. Similarly, the revised regulations would include identical adaptive management provisions and reporting requirements as the existing regulations.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning the Navy's request (see **ADDRESSES**). NMFS will consider all information, suggestions, and comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals by the Navy, if appropriate.

Dated: May 24, 2022.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

[FR Doc. 2022-11577 Filed: 5/31/2022 8:45 am; Publication Date: 6/1/2022]